

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

WIKIMEDIA FOUNDATION,

Plaintiff,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

Civil Action No.
1:15-cv-00662-TSE

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants National Security Agency (“NSA”); Paul M. Nakasone, Director of the NSA, in his official capacity; Office of the Director of National Intelligence; Honorable Daniel R. Coats, Director of National Intelligence, in his official capacity; the United States Department of Justice; and Matthew G. Whitaker, Acting Attorney General¹ (hereinafter “Defendants”) move for summary judgment as to all of Plaintiffs’ claims against the Defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The grounds for this motion are that there is no genuine issue of material fact that Plaintiff cannot meet its burden of establishing its standing. Due to the required exclusion of evidence subject to the Defendants’ assertions of the state secrets privilege and of the statutory privileges established by 50 U.S.C. § 3024(i)(1) and 50 U.S.C. § 3605(a), Plaintiff lacks competent and admissible evidence with which to establish its standing to maintain any of its claims. Indeed, the undisputed expert evidence in the record rebuts a key fact essential to Plaintiff’s theory of standing. Additionally, even if Plaintiff could show a genuine issue of material fact as to its standing, summary judgment still must be granted in favor of the Defendants because properly excluded state secrets

¹ Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Matthew G. Whitaker has been automatically substituted as a party defendant for Jefferson B. Sessions, III.

would be needed to litigate the case and any attempt to proceed would present an unacceptable risk of disclosing that privileged information. The relevant facts, authority, and arguments supporting the Defendants' motion are set forth in the accompanying Brief in Support of Defendants' Motion for Summary Judgment.

For the reasons stated therein, Defendants' motion should be granted, judgment awarded to the Defendants as a matter of law, and final judgment entered for the Defendants as to all counts in Plaintiff's Amended Complaint.

Dated: November 13, 2018

Respectfully submitted,

JOSEPH H. HUNT
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ANTHONY J. COPPOLINO
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/s/ James J. Gilligan
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Counsel for Defendants

Certificate of Service

I hereby certify that on November 13, 2018, I caused the foregoing Motion for Summary Judgment, including the exhibits thereto, to be filed electronically with the Clerk of the Court through the CM/ECF system. I further certify that I caused a copy of the under seal portions of Defendants' motion, in particular the brief in support of the motion and attached Exhibits 1-5, to be e-mailed to Plaintiff's counsel at the following e-mail addresses:

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[PROPOSED] ORDER

Upon consideration of the Defendants’ Motion for Summary Judgment, and the parties’ respective submissions in support thereof and in opposition thereto, the Court finds as follows:

When the Fourth Circuit heard this case, it held that Plaintiff Wikimedia Foundation had plausibly alleged its standing based on three “key” allegations: (i) that its communications almost certainly traverse every “international backbone link” between the United States and the rest of the world; (ii) that the NSA is conducting Upstream surveillance at one or more of these “international backbone link[s],” and (iii) that at any such link where the NSA conducts Upstream surveillance, as a technical matter, it “must be” copying and reviewing all international text-based communications transiting that link in order to “reliably” obtain communications to or from its intelligence targets.

Wikimedia Found. v. NSA, 857 F.3d 193, 210-11 (4th Cir. 2017).

Plaintiff, however, has no adduced competent and admissible evidence to support two of these three alleged key facts: that the NSA conducts Upstream surveillance at international Internet links traversed by Wikimedia’s communications, and that the NSA “must be” copying and reviewing all communications traversing any such link where it conducts surveillance, including Wikimedia’s. Indeed, the undisputed expert evidence in the record rebuts the latter assertion. Without evidence

to support either of these two key elements of Plaintiff's standing theory, Defendants' motion for summary judgment must be granted.

Additionally, separate and apart from Plaintiff's failure to adduce any competent and admissible evidence to support its theory of standing, summary judgment must also be granted in favor of the Defendants because properly excluded state secrets would be needed to litigate the case, and any attempt to proceed would present an unacceptable risk of disclosing that privileged information.

It is therefore, ORDERED, that Defendants' motion for summary judgment is GRANTED, and that judgment is entered in favor of Defendants.

Dated: _____

Hon. T.S. Ellis, III
United States District Judge

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Notice of Filing of Document Under Seal

Defendants' Brief in Support of Defendants' Motion for Summary Judgment, which is an attachment to Defendants' Motion for Summary Judgment will be electronically filed under seal within 24 hours of the filing of this Notice.

I certify that at the same time I am filing this Notice, I will serve copies of the document identified above by e-mail on Plaintiff's counsel pursuant to the Certificate of Service attached to Defendants' motion.

Dated: November 13, 2018

Respectfully submitted,

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Defendants' Exhibit 1, which is an attachment to Defendants' Motion for Summary Judgment will be electronically filed under seal within 24 hours of the filing of this Notice.

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Defendants' Exhibit 2, which is an attachment to Defendants' Motion for Summary Judgment will be electronically filed under seal within 24 hours of the filing of this Notice.

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Defendants' Exhibit 3, which is an attachment to Defendants' Motion for Summary Judgment will be electronically filed under seal within 24 hours of the filing of this Notice.

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